Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

MANJIT S. KANG,

Petitioner,

-versus-

STATE OF LOUISIANA; LSU DEPARTMENT OF AGRONOMY; BOARD OF SUPERVISORS OF LOUISIANA STATE UNIVERSITY

Respondents,

On Petition for Writ of Certiorari to The United States of Appeals for the Fifth Circuit

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PETITION FOR CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

(1) Did the Court of Appeals deprive Petitioner, Manjit S. Kang, of rights afforded by the Civil Rights Act of 1964, 42 U.S.C. §2000e-3(a) by narrowing the applications of sections 703(a)(1) and 704(a) by relying on two judge made terms, "adverse employment action" and "ultimate employment decision" in petitioner's retaliation claim?

(2) Did the Court of Appeals err by granting Defendants' Motion for Summary Judgment in this Title VII discrimination case?

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OPINIONS BELOW

The unpublished decision of the United States Court of Appeals for the Fifth Circuit is set forth in the Appendix, p. 1a and is unreported. The unpublished decision of the United States Middle District Court of Louisiana is set forth in the Appendix, p. 7a and is unreported.

STATEMENT OF THE BASIS OF JURISDICTION OF THE SUPREME COURT

The statutory provision for this Court's jurisdiction is 28 U.S.C. Section 1254. The United States Court of Appeals for the Fifth Circuit issued its Decision in this case on August 2, 2000. This Petition was filed within 90 days of the issuance of said Decision, and is thus timely.

Petitioner shows that this Court should consider this Writs Application because of the decision of the Court of

Appeals conflicts with a decision of another Court of Appeals and this Court on the same legal issue.

It is respectfully submitted that this Court consider and accept this Writs Application which will settle the conflict among the lower courts, resolve a significant issue of law and correct a decision that will cause material injustice to Petitioner and others so positioned.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

The Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e *et. seq.*

Section 704(a) of Title VII provides:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees. . .because he has opposed any practice made an unlawful employment practice by this subchapter, or because he

> has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter. 42 U.S.C. §2000e – 3(a).

STATEMENT OF THE CASE

This is an employment discrimination suit filed pursuant to 28 U.S.C. Sections 1331, 1343, 2201 and 2202 and 42 U.S.C. 1981 and the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e *et seq*.

Plaintiff, appellant, Manjit Kang, is a person of East Indian origin of the full age of majority domiciled in the Parish of East Baton Rouge, State of Louisiana, who brought a suit against Defendants, appellees, seeking damages for violation of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e *et seq*., on August 7, 1998.

On September 15, 1999, the Magistrate Judge below, recommended that the Defendants' Motion for Summary Judgment be granted and that the plaintiff's claims be dismissed, with prejudice.

Plaintiff, Manjit Kang, filed an Objection to the Magistrate Judge's report and recommendation on September 27, 1999.

On December 15, 1999, the Trial Court rendered a summary judgment in favor of Defendants and dismissed the case. The appeal was perfected from the Trial Court's summary judgment.

The United States Court of Appeals for the Fifth Circuit affirmed the District Court's decision on August 2, 2000.

Manjit S. Kang, who received his Ph.D. degree in 1977, was initially hired by Defendants on May 1, 1986 as

associate professor in the Department of Agronomy at a salary of $35,000.00 (Thirty Five Thousand Dollars and No Cents) per year. Plaintiff was promoted to a full professor in July, 1990. Plaintiff had worked for Defendants for ten years in the Department of Agronomy at the time of Defendants' discriminatory actions. Manjit Kang taught, published, and researched in the areas of quantitative genetics, statistical genomics and QTL analyses in the Department of Agronomy.

Plaintiff was a full professor with a salary of $54,306.00 (Fifty Four Thousand Three Hundred Six Dollars and No Cents) per year at the time plaintiff filed for the announced position of Professor/Department Head for the Department of Agronomy.

Plaintiff applied for the Position of Department Head in June 1996. There were a total of seven candidates, which

consisted of five whites, one Egyptian, and the plaintiff who is of East Indian origin. Only two candidates were from within the LSU system—the plaintiff and the Egyptian professor.

On August 22, 1996, plaintiff, Professor Kang, received notification from Frank Guillot that his application for the Department Head of Agronomy at Louisiana State University was not included for further consideration. Plaintiff was not given an opportunity to interview for the position of Department Head by the Defendants.

The Search Committee interviewed Daryl Bowman, North Carolina State University, who submitted his application after the application deadline on August 1, 1996; Jerome Cherney, Cornell University; and Joseph Stucki, University of Illinois for the position of Department Head of Agronomy.

The candidates were chosen by the Defendants for interview without the benefit of outside references and written reports of the candidates' qualifications for the position.

In October 1996, Joseph Stucki, a white male from the University of Illinois, was hired for the position of Department Head for the Department of Agronomy at Louisiana State University, even though Stucki did not have any administrative experience. This offer was turned down by Dr. Stucki for unknown reasons.

The Defendants offered the position of Department Head of Agronomy to other white male candidates, but none accepted this position for unknown reasons.

On September 20, 1996, Freddie Martin was appointed as Interim Head of the Department of Agronomy, who was eventually selected as permanent head by the

Defendants, although Freddie Martin did not apply for the position in June 1996.

On November 18, 1996, plaintiff, Professor Manjit Kang, filed a charge of discrimination against Louisiana State University, Department of Agronomy charging that he had been discriminated against because of his national origin, East Indian. Plaintiff charges that he was more qualified than the white males selected and/or offered the job of Department Head of the Department of Agronomy.

On September 30, 1997, plaintiff, Professor Manjit Kang, filed a charge of discrimination charging that the Defendants retaliated against him for filing the initial charge of discrimination on November 18, 1996.

The Defendants' acts of retaliation began on January 16, 1997 when plaintiff was denied official leave to participate in a professional review program. Plaintiff was

forced to use his annual leave for official university business and on March 27, 1997, plaintiff received a poor evaluation from Dr. Freddie Martin, Head of Agronomy Department. Prior evaluations of plaintiff before this filing of the initial discrimination charges were excellent evaluations.

Defendants continued their harassment of plaintiff Kang when on August 28, 1997, plaintiff was refused reimbursement by the Defendants for attending and presenting a paper at an international symposium, a problem that had not occurred before the filing of the discriminatory charges against Defendants, even though plaintiff followed the same proceedings in a timely fashion.

Also, in February, May, and June, 1997, the Defendants took some of the plaintiff's research funds to pay for general publication costs, a cost normally paid by the

Department, while also engaging in other retaliatory and demeaning activities armed at the plaintiff.

Also, various faculty members deliberately attempted to annoy, harass, and intimidate him such as some of the other professors not speaking to him or following him in the parking lot and/or coughing and making other noises when around him.

Harmed by the Defendants' discriminatory behavior of denying the plaintiff a chance for promotion and subsequent retaliatory acts, plaintiff filed this lawsuit.

ARGUMENT

I. THE COURT OF APPEALS DEPRIVED PETITIONER, MANJIT S. KANG, OF RIGHTS AFFORDED BY THE CIVIL RIGHTS ACT OF 1964, 42 U.S.C. §2000e–3(a) BY NARROWING THE APPLICATIONS OF SECTIONS 703(a)(1)

AND 704(a) BY RELYING ON TWO JUDGE MADE TERMS, "ADVERSE EMPLOYMENT ACTION" AND ULTIMATE EMPLOYMENT DECISIONS."

Under 42 U.S.C. §2000e–3, "it is unlawful for an employer to discriminate against any individual because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation proceeding, or hearing under this subchapter."

Petitioner, Manjit S. Kang, contends that he was retaliated against by the Defendants for bringing a charging of national origin discrimination before the Equal Employment Opportunity Commission.

There are three essential elements of a retaliation claim--(1) protected activity—opposition to discrimination or participation in the statutory complaint process; (2) adverse action; and (3) causal connection between the protected activity and the adverse action. *EEOC Compliance Manual, Section 8, 1998.*

The District Court said the Appeals affirmed that Defendants' conduct as characterized by Petitioner, Manjit S. Kang, did not constitute adverse employment action pursuant to *Mattern v. Eastman Kodak Co.*, 104 F. 3d 702 (5th Cir. 1997). The District Court stated that the interpreting of the term "discriminate" in the context of 42 U.S.C. §2000e–3 includes only ultimate employment decisions, such as hiring, granting leave, discharging, promoting, and compensating.

Whereas, Petitioner contends that the conduct by the Defendants toward Petitioner such as deliberate attempts of harassment, annoying, and intimidation by other professors in his department, poor evaluations, denying of official leave, forced to take annual leave for official university business, and refusing to pay for standard costs for publication for a book edited for the university were retaliatory acts that occurred after Petitioner filed his discrimination claim with the EEOC.

Furthermore, all of the adverse acts by the Defendants were contrary to Defendants' prior action regarding each and every situation cited before filing of Petitioner's discrimination claim.

The Court of Appeals Fifth Circuit stated in its Decision that it is a longstanding rule that one panel may not

overrule another panel, even it if disagrees with the earlier panel's holding.

Petitioner, Manjit S. Kang, could not challenge *Mattern* because he was not terminated from his employment, a condition required by *Mattern* under the "ultimate employment decision" concept. Manjit Kang looked at the reasoning behind the strong dissent in *Mattern*. The EEOC disagrees with this limited interpretation of Sections 703(a)(1) and 704(a) and states that such constructions are unduly restrictive. EEOC says that some courts have held that the retaliation provisions apply only to retaliation that takes the form of ultimate employment acts, while others have construed the provisions more broadly but have required that the action materially affect the terms, conditions, or privileges of employment. *EEOC Compliance Manual, Section 8, 1998.*

Different circuits have reached different decisions in interpreting these Statutes. *Mattern v. Eastman Kodak Co.*, 104 F. 3d 702 (5th Cir. 1997) and *Munday v. Waste Management of North America*, 126 F. 3d 239 (4th Cir. 1997) both with limiting scope of the Statutes. Whereas in *Hashimoto v. Dalton*, 118 F. 3d 671 (9th Cir. 1997), *Smith v. Secretary of Navy*, 659 F. 2d. 1113, 1120 (D.C. Cir. 1981), *Knox v. State of Indiana*, 93 F. 3d. 1327; 1334 (7th Cir. 1996), *Passer v. American Chemical Society*, 935 F. 2d. 322, 331 (D.C. Cir. 1991), all employed a broader reading of the said Statutes, which included some of the adverse acts complained in this present case.

Petitioner, Manjit S. Kang, contends that the Defendants' adverse acts over a long period of time were abusive and emotionally draining that interfered with his job performance.

The Petitioner contends that the Court's opinion in *Harris v. Forklift Systems, Inc.* 510 U.S. 17, 21-23, could be used to resolve the issues of "ultimate employment decision" and "adverse employment action" that is before the Court in this matter.

II. THE COURT OF APPEALS ERRED BY GRANTING DEFENDANT'S SUMMARY JUDGMENT IN THIS TITLE VII DISCRIMINATION CASE.

"On a motion for summary judgment, the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine where there is a genuine issue for trial." *Amburgey v. Corhart Refractories Corp., Inc.* 936 F. 2d 805, 809 (5th Cir. 1991) citing *Anderson v. Liberty Lobby,*

Inc. 477, U.S. 242, 249, 106 S.Ct. 2505, 2510, 91 L. Ed. 2d 202, 212 (1986).

In this case, the District Court Magistrate Judge states in her opinion that Petitioner, Manjit S. Kang, had failed to present sufficient evidence to prove an essential element of his claim. Petitioner contends that this is weighing of the evidence and that the evidence presented was weighed subjectively by the Court.

The Magistrate Judge stated that plaintiff, Manjit Kang had established a prima facie case of discrimination. Once the prima facie case has been established, the burden of production then shifts to the employer to articulate and clearly set forth a legitimate, nondiscriminatory reason for the adverse treatment of the plaintiff.

In this case, the defendants did not meet that burden. In evaluating Professor Kang and Professor Stucki's résumés, the Magistrate Judge put emphasis on Stucki's résumé by outlining and citing the number of times of each activity, but failed to give weight and emphasis to Kang's résumé. The Magistrate Judge even failed to give Kang credit for his two years as a research station manager at Cargill and Kang's five years at the University of Florida as a manager.

There is nothing in Stucki's résumé that would give the defendants reason to believe that Stucki was as qualified or better qualified to administer a department at Louisiana State University than plaintiff, Manjit S. Kang. In fact, Stucki stated in his letter of application that he had been in research and teaching for twenty years. Stucki did not claim he had any university administration experience. Stucki also

stated in his Statement of Administrative Philosophy that his administrative philosophy as a department head would evolve with experience in the role. See Exhibit "G"—Plaintiff's Opposition to Summary Judgment. Plaintiff, Manjit Kang, was not given the opportunity by the defendants to gain the experience as a departmental head of the Agronomy Department.

The defendants also interviewed Jerome H. Cherney and Darryl Brown, applicants who did not have any significant administrative experience, while at the same time denying plaintiff an interview. See Exhibits 1 and 2—Plaintiff's Opposition to Summary Judgment.

In the context of a summary judgment proceeding, the question is not whether the plaintiff proves pretext but rather the plaintiff raises a genuine issue of fact regarding pretext. *Thornbrough v. Columbus and Greenville R. Co.*

760 F. 2d 633, 645, 646 (1985). The defendants are contending that they were seeking someone that would assume seven duties and of those seven, plaintiff, Manjit Kang, has gained valuable experience as a tenured professor in the Agronomy Department, over the last eight years in the Agronomy Department. Exhibits B and F – Plaintiff's Opposition to Summary Judgment.

To interview three applicants who are from outside of the state, the university, and the department; who do not have any significant administrative experience; and no departmental head experience over an applicant who has been with the university for eight years and who has successfully represented the university locally, nationally, and internationally, the plaintiff contends that defendants articulated reasons are pretexts for racial discrimination.

A plaintiff may establish circumstantial evidence of intentional discrimination by showing that a defendant's articulated nondiscriminatory reason was pretextual. *Texas Department of Mental Health and Mental Retardation*, 102 F. 3d 137 (5th Cir. 1996).

The defendants did not meet the initial burden of a summary judgment pointing out the absence of evidence supporting the plaintiff's case; as stated in *Stults v. Conoco, Inc.*, 76 F. 3d 651, 57 (5th Cir. 1996).

Petitioner, Manjit S. Kang, filed an Opposition to the Magistrate Judge's recommendation for Summary Judgment along with exhibits, such as Professor Stucki's letter of application and résumés of all applicants who were interviewed by the Defendants.

Petitioner had provided with his opposition to Defendants' Motion for Summary Judgment all of

Petitioner's awards, letters of commendations, and excellent reviews from Defendants during his eight-year tenure at the university. In essence, Petitioner pointed to a smoking personnel file. See *Thornbrough v. Columbus and Greenville R. Co.* 760 F. 2d 633, 647 (1985) and *Bienkowski v. American Airlines, Inc.* 851 F. 2d 1503 (5th Cir. 1986).

Defendants contend in their Brief to the Court of Appeals that disparities in qualifications are not enough in and of themselves to demonstrate discriminatory intent unless those disparities "are so apparent as virtually to jump off the page and slap you in the face."

Petitioner, Manjit S. Kang, contends that this Court has not addressed or sanctioned such a standard.

CONCLUSION

Section 704(a) of Title VII is the primary source of protection against retaliation for those who participate in the

process of vindicating civil rights through Title VII. Under that section, broad protection is afforded to the participant in order to effectuate the purposes of Congress. *Pettiway v. Am. Cast Iron Pipe Co.*, F. 2d 998, 1006 (5th Cir. 1969).

To allow each circuit to have different criteria for the interpretation of this statute will drastically weaken the intent of the statute and also make for nonconformity in the treatment of persons who bring charges of retaliation.

A person should not have to be fired from his employment to prove a claim of retaliation. In this case, Petitioner, Manjit S. Kang, is a tenured professor; therefore, Defendants' cannot readily fire him, but Defendants can harass Petitioner, Manjit S. Kang, in a number of ways to make his workplace hostile.

Petitioner, Manjit Kang, contends that a genuine issue of material fact was raised through the use of

Petitioner's personnel files, depositions, and résumé; therefore a summary judgment was not appropriate in this case. A jury is the proper vehicle to evaluate affidavits, records, résumés, and personnel files in this discrimination case. The Fifth Circuit Court of Appeals has reversed in cases where this kind of evidence is presented. See *Bienkowski v. American Airlines, Inc.* 851 F. 2d 1503, 1506, 1507-09 (5th Cir. 1988).

Respectfully submitted,

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(Any footnotes trail end of each document)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-30029 Summary Calendar

MANJIT S KANG,

Plaintiff-Appellant,

VERSUS

STATE OF LOUISIANA, LSU DEPARTMENT OF AGRONOMY; BOARD OF SUPERVISORS OF LOUISIANA STATE UNIVERSITY,

Defendants-Appellees.

Appeal from the United States District Court
For the Middle District of Louisiana, Baton Rouge
USDC No. 98-CV-700-B

August 02, 2000, Decided

Before SMITH, PARKER, and DENNIS, Circuit Judges.

PER CURIAM:*

Plaintiff, Manjit S. Kang, appeals a summary judgment for defendants in his employment discrimination and retaliation suit in which he invoked the protections of 42 U.S.C. § 2000e. We affirm.

Manjit, a Louisiana State University ("LSU") agronomy professor, brought suit alleging that he was discriminated against on the basis of his national origin (East Indian) when he was not selected as the Department Head for the Department of Agronomy. The district court adopted the report and recommendation of the magistrate judge, which concluded that Kang established a prima facie case of discrimination and that LSU's articulated nondiscriminatory reason for its decision that is, other applicants were better qualified to perform the administrative duties required in the position -- was not pretextual. Kang presented no evidence that (1) the reason was false or (2) discrimination was the

real reason for the employment action. See *Walton v. Bisco Industries, Inc.*, 119 F.3d 386, 370(5th Cir. 1997). After reviewing the record, we agree that the evidence does not support the conclusion that LSU's articulated reason for selecting a different candidate for the position was pretextual. *See id.*

The district court also concluded that the conduct Kang characterizes as retaliatory does not constitute adverse employment action under the anti-retaliation provision of federal employment law pursuant to this court's opinion in *Mattern v. Eastman Kodak Co.*, 104 F.3d 702 (5th Cir. 1997). Kang does not challenge this conclusion on appeal, but rather argues that Mat tern was wrongly decided. This circuit has a longstanding rule that one panel may not overrule another panel, even if it disagrees with the earlier

panel's holding. See *United States v. Mcphail*, 119 F.3d 326, 321 (5th Cir. 1997). We are therefore bound by *Mattern*.

For the foregoing reasons, we affirm the district court's grant of summary judgment for defendants.

AFFIRMED.

Footnotes

*Pursuant to 5th Cir. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

MANJIT S. KANG

VERSUS **CIVIL ACTION**

STATE OF LOUISIANA, ET AL **NO. 98-700-B-M2**

OPINION

After independently reviewing the entire record in this case and for reasons set forth in the Magistrate Judge's Report to which an objection and a memorandum in support of the report were filed:

IT IS ORDERED that the defendants' motion for summary judgment be GRANTED and this suit be dismissed. Judgment shall be entered accordingly.

Baton Rouge, Louisiana, December 15, 1999.

FRANK J. POLOZOLA,
CHIEF JUDGE
MIDDLE DISTRICT OF
LOUISIANA

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

MANJIT S. KANG

VERSUS **CIVIL ACTION**

STATE OF LOUISIANA, ET AL **NO. 98-700-B-M2**

JUDGMENT

For the written reasons assigned:

IT IS ORDERED AND ADJUDGED that judgment shall be entered in favor of the defendants and against the plaintiff dismissing this suit with prejudice.

Baton Rouge, Louisiana, December 15, 1999.

FRANK J. POLOZOLA,
CHIEF JUDGE
MIDDLE DISTRICT OF
LOUISIANA

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

MANJIT S. KANG

VERSUS **CIVIL ACTION**

STATE OF LOUISIANA, ET AL **NO. 98-700-B-M2**

REPORT AND RECOMMENDATION

This matter is before the Court on the defendant's Motion for Summary Judgment.

(R. Doc. 34.) Defendant, the Board of Supervisors of Louisiana State University and Agricultural and Mechanical College (LSU), contends that the plaintiff has insufficient evidence to support his claims that he was denied a promotion based on his ethnic heritage and that LSU employees retaliated against him for asserting his rights under federal civil-rights and employment-discrimination law.

FACTS AND PROCEDURAL HISTORY

The essential facts of this case are not seriously disputed- Plaintiff Manjit Kang is a professor of agronomy at LSU. In June 1996, he applied for a vacant position as head of the agronomy department. Kang's ethnic background is East Indian.

Seven candidates applied for the job. Of the six other candidates, five were white, and one was Egyptian. Both Kang and the Egyptian applicant were LSU professors. A search committee was appointed to submit a list of recommended names.

In August 1996, Kang was notified that he would not be interviewed for the position. Two months later, LSU officials chose Joseph Stucki, a white man from the University of Illinois, to head the department. Stucki refused

the offer, and LSU officials decided to reopen the application process.

During the second application process, Kang did not submit his name. After reviewing the second round of applications, the committee recommended a white professor from Kentucky. He also declined the offer. The committee's second choice was Freddie Martin, a white LSU professor, who had been appointed acting department head until the conclusion of the search. LSU officials offered Martin the job, and he accepted it.

In November 1996, Kang filed a complaint with the U.S. Equal Employment Opportunity Commission, in which he alleged that LSU's failure to consider him for the promotion was based on racial or ethnic discrimination. Kang claimed that he was more qualified for the position than Stucki.

In September 1997, Kang filed a second complaint with the EEOC. This time, he alleged that LSU personnel had retaliated against him for filing the first EEOC complaint On August 7, 1999, Kang filed the present lawsuit, invoking 42 U.S.C. § 1981. Kang later amended his complaint to allege violations of federal employment discrimination law, 42 U.S.C. § 2000e *et seq*. The Court has dismissed Kang's claims under § 1981 on the basis of 11th Amendment immunity. (R. Doc. 22.}

ANALYSIS

(1) Discrimination claim.

In a Title VII discrimination case, the plaintiff bears the burden of proving that the defendant intentionally discriminated against him because of race. *Equal Employment Opportunity Commission v. Exxon Shipping Co.*, 745 F.2d 967, 972 (5th Cir. 1984). Because sufficient

direct evidence of intentional employment discrimination rarely is present in such cases, the Supreme Court has fashioned special rules of proof under which the burden of production (but not of persuasion} shifts between the employee and employer. *Thornbrough v. Columbus and Greenville Railroad Co.*, 760 F.2d 633, 638 (5th Cir. 1985). Under this framework, the plaintiff bears the initial burden of establishing a prima facie case of racial discrimination. *McWilliams v. Escambia County School Board*, 658 F.2d 326, 330-31 (5th Cir. 1981).

In this case, Kang was denied a promotion. In that situation, he must prove a prima facie case by showing that (1) he is a member of a protected class, (2) he sought and was qualified for an available employment position, {3) he was rejected for that position, and (4) the employer continued to seek applicants with the plaintiff's

qualifications. *Scales v. Slater*, 181 F.3d 703, 709 (5th Cir. 1999).

The Court concludes that Kang has established a prima facie case of discrimination. As a person of East Indian descent, he is a member of a protected group. See, *Jatoi v. Hurst-Euless-Bedford Hospital Authority*, 807 F.2d 1214 (5thCir.1987), cert. den., 484 U.S. 1010, 108 S.Ct. 709, 98 L.Ed.2d 660 (1988). It is undisputed that Kang sought the position, and LSU does not seriously contend that he was unqualified. Rather, LSU claims that Kang was simply less qualified than other applicants. It also is undisputed that LSU rejected Kang for the position. The evidence further indicates that LSU continued to seek applicants with Kang's general qualifications, although LSU, of course, contends that those applicants it chose over Kang had superior qualifications.

As a result, Kang has established a prima facie case of discrimination. The establishment of a prima facie case creates a rebuttable presumption that the employer unlawfully discriminated against the employee because of his race. *McDaniel v. Temple Independent School District*, 770 F .2d 1340, 1345-46 (5U. Cir. 1985). The burden of production then shifts to the employer to articulate and clearly set forth, through the introduction of admissible evidence, a legitimate, nondiscriminatory reason for the adverse treatment of the plaintiff-employee. *Id.* at 1346. The employer need not persuade the trier of fact that it actually was motivated by the reasons advanced, because the employer bears only the burden of production, not the burden of persuasion. *Mayberry v. Vought Aircraft Co.*, 55 F.3d 1086, 1091, n- 4, (51h Cir. 1995); *McWilliams*, 658 F.2d at 331.

In the present case, LSU contends that it denied Kang the promotion because there were better qualified applicants. The initial announcement for the position, to which Kang submitted an application, outlined the following desired qualifications:

(1) A Ph.D. in agronomy or a closely-related field.

(2) Demonstrated scholarly ability to warrant appointment to tenured full professor,

(3) Administrative and leadership capabilities.

That announcement also listed the following duties that the successful candidate would be required to assume:

(1) Administer teaching and research functions.

(2) Provide leadership in the areas of courses and curricula.

(3) Student recruitment.

(4) Promotion of faculty excellence in research and teaching.

(5) Budget preparation and management.

(6) Faculty evaluation and advancement.

(7) Development and maintenance of communication and interaction with university administrators, faculty, extension and state and regional groups.

Thus, it is clear from the job announcement that the role of the department head was weighted toward administrative duties. LSU does not dispute that Kang had sufficient academic qualifications for the position. However, it is in the administrative area that LSU contends Kang was deficient in comparison to other candidates.

To evaluate LSU's claim, the Court must make a comparison of the qualifications. Before doing this, however, the Court first must determine with whom Kang's

qualifications are to be compared. LSU went through two application and interview periods before making its final selection. However, Kang submitted an application only during the first period. Accordingly, the comparison of qualifications necessarily must be between Kang and Stucki, the person the hiring committee eventually recommended for the position.

Stucki's resume shows that he has a Ph.D. in soil physical chemistry and 67 published academic works. He identified 24 separate administrative duties with the University of Illinois and several such duties in the community. Among these administrative accomplishments were being elected to the Champaign Community Schools Board of Education, including serving as president of the board. Stucki served on numerous committees within the university, including chairmanship of the agronomy

department's long-range planning committee subgroup on soil chemistry and the agronomy department's task force on academic positions. Moreover, Stucki obtained 32 separate research grants for the university.

Kang's résumé lists a Ph.D. in crop science and identifies far more publications than Stucki, including three books. This is not surprising, as LSU has not seriously questioned

Kang's academic credentials for the position. To the contrary, R. Larry Rogers, vice chancellor for research and director of the Louisiana Agricultural Experiment Station testified, that Kang's evaluation as a scientist is not the reason he was not selected (Deposition of R. Larry Rogers, May 21,1999, pp. 74-75.) The committee, which Rogers participated in selecting, found Kang to be deficient In administrative expertise. (*Id.*, pp. 75-76.)

Kang's resume reflects fewer items that can be classified as administrative experience. He served as state yield trials coordinator for corn and grain sorghum and attended managerial training seminars of a relatively brief duration. Kang also was chairman of the genetics and plant breeding award for industry committee and was appointed to the general awards committee of the Crop Society of America. He also was appointed external assessor for appointments for Associate Professor/Professor in the agriculture faculty of the University of Agriculture Malaysia. In Kang's deposition, he also mentioned that he once served as manager of a research station. (Kang Deposition, April 23, 1999, pp. 39-40.) During this deposition, he also identified an instance in which he was a committee chairman of the National American Society of Agronomy. (*Id.*, p. 41.)

This evidence satisfies LSU's burden of producing evidence of non-discriminator) reasons for not offering Kang the promotion - again, distinguishing this from the burden of persuasion. Once an employer satisfies its burden of production, the rebuttable presumption of discrimination disappears, and the burden then shifts to the employee to prove by a preponderance of the evidence that the employer's proffered reasons for the adverse employment action are merely a pretext for racial discrimination. *McDaniel*, 770 F.2d at 1346; *McWilliams*, 658 F.2d at 331.

A reason is not considered to be a pretext for discrimination unless the plaintiff shows both that (1) the reason was false and (2) discrimination was the real reason for the employment action. *Walton v. Bisco Industries, Inc.*, 119 F .3d 368, 370 (5th Cir. 1997). The plaintiff must persuade the trier of fact either that a racially discriminatory reason more

likely motivated the employer or that the reasons advanced for the adverse employment action are unworthy of credence. *McWilliams*, 658 F .2d at 331.

A plaintiff who alleges employment discrimination is not required to come forward with direct evidence of discriminatory intent because such evidence is rare. *Grimes v. Texas Department of Mental Health and Mental Retardation*, 102 F .3d 137 (5th Cir. 1996). A plaintiff may establish circumstantial evidence of intentional discrimination by demonstrating that a defendant's articulated nondiscriminatory reason was pretextual. *Id.* The ultimate burden of persuading the trier of fact that the employer intentionally discriminated against the employee remains at all times with the employee. *Bunch v. Bullard*, 795 F.2d 384, 396 (5th Cir.1986). Moreover, when a plaintiff claims that illegal discrimination has caused him to lose a

promotion, he must show that he was "clearly better qualified" (as opposed to merely better qualified) than the person who was hired. *E.g. Odom v. Frank*, 3 F.3d 839, 846-847 (5th Cir. 1993).

In the present case, Kang has presented no evidence to demonstrate that illegal discrimination, and not a concern about his administrative capabilities, was the true reason behind LSU's decision not to consider him for the position. A comparison of Kang's qualifications with those of Stucki, the person the committee eventually selected, does not show that Kang was "clearly better qualified" than Stucki.

As a matter of law, Kang has failed to present sufficient evidence to prove an essential element of his ethnic discrimination claim, on which he bears the burden of proof at trial. Thus, summary judgment is appropriate, since a complete failure of proof concerning an essential element of

the non-moving party's case necessarily renders all other facts immaterial. *Smith v. Medical and Surgical Clinic Assoc.*, 118 F .3d 416, 418 (5th Cir. 1997), *cert. den. sub nom*, 118 S.Ct. 1034, 140 L.Ed.2d 102 (1998); *Cabrol v. Town of Youngsville*, 106 F.3d 101, 108 (5th Cir. 1997)

(2) Retaliation claim.

Kang also contends that he was a target of retaliation by LSU personnel after he filed his civil rights complaint with the Equal Employment Opportunity Commission. Under 42 U.S.C. § 2000e-3, it is unlawful for an employer to "discriminate against any individual. . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding , or hearing under this subchapter." In interpreting the term "discriminate" in this context, the

Fifth Circuit has held, in numerous cases, that the term includes only ultimate employment decisions, such as hiring, granting leave, discharging, promoting and compensating. *E.g., Burger v. Central Apartment Management, Inc.*, 168 F.3d 875 (51h Cir. 1999)(denial of lateral transfer request not an "ultimate employment decision"); *Webb v. Cardiothoracic Surgery Associates*, 139 F .3d 532 (51h Cir. 1998)(rude and uncivil treatment of employee not actionable); *Messer v. Meno*, 130 F. 3d 130 (5th Cir. 1997), *reh'g. den.*, 149 F.3d 1181 (5th Cir.1998), *cert. den.*, 119 S.Ct. 794, 142 L.Ed.2d 657 (1999)(employer's failure to resolve employee's internal grievance, close monitoring of employee's conversations, criticism of employee's work and conduct, failure to listen to employee's input and failure to allow employee to represent the employer at certain functions and reduction in the size of employee's department

as part of an agency-wide reduction not "ultimate employment decisions"); *Mattem v. Eastman Kodak Co.*, 104 F.3d 702 (5th Cir. 1997), *cert. den.*, 118 S.Ct. 336, 139 L.Ed.2d 260 (1997)(actions such as hostility from fellow employees, having tools stolen and resulting anxiety are not actionable).

In the present case, Kang alleges that LSU officials and co-employees retaliated against him after he filed an EEOC complaint by taking the following actions: (1) denying him official leave to participate in a professional review program, forcing him to use his annual leave for the program, (2) giving him a poor evaluation after previously receiving excellent evaluations, (3) refusing him reimbursement for attending and presenting a paper at an international symposium, (4) taking some of his research money to pay for general publication costs, an expense LSU

normally paid, (5) other "minor charges and major hassles," which included being whistled at.

While such conduct, if true, may be inappropriate and unbecoming for professionals, under controlling Fifth Circuit precedent, it does not constitute an "adverse employment action" under the anti-retaliation provision of federal employment discrimination law. Accordingly, summary judgment on this issue should be granted.

RECOMMENDATION

Accordingly, it is recommended that the defendants' Motion for Summary Judgment (R.Doc. 34) be granted and that the plaintiff's claims be dismissed, with prejudice.

Signed in Baton Rouge, Louisiana, this 15th day of September, 1999.

MAGISTRATE JUDGE
CHRISTINE NOLAND

Supreme Court, U.S.
FILED
DEC 18 2000
CLERK

(2)

No. 00-705

In The

Supreme Court of the United States

MANJIT S. KANG,

Petitioner,

versus

STATE OF LOUISIANA and LOUISIANA STATE UNIVERSITY DEPARTMENT OF AGRONOMY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATUTES

42 U.S.C. § 2000e-3(a) ..... *passim*

STATEMENT OF THE CASE

Petitioner herein has accurately summarized the procedural history of this case. Likewise, he has correctly pointed out that this Court has jurisdiction in this matter. He has also fairly stated the issues on which the parties herein disagree. Although he has, not surprisingly, emphasized those facts which are favorable to him, he has, nevertheless, adequately summarized the information which this Court needs to know about this litigation. Additional relevant facts regarding the comparison of petitioner's qualifications to those of the candidate originally selected, are concisely presented in the Magistrate Judge's Report and Recommendation which was relied upon by both the district court and the court of appeals.

Suffice it to say, then, that The Board of Supervisors of Louisiana State University and Agricultural and Mechanical College ("LSU")[1] denies that petitioner was the victim of either discrimination or retaliation. In fact, those LSU employees who are alleged to have discriminated and then retaliated against petitioner vehemently deny those charges.

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[1] Since petitioner occasionally uses the plural to refer to LSU ("defendants"or "respondents"), it should be noted that LSU is the only defendant in this case. The State of Louisiana and the LSU Department of Agronomy were dismissed in the district court.

SUMMARY OF ARGUMENT

In his first assignment of error, petitioner suggests that the Fifth Circuit misinterpreted the Civil Rights Act of 1964 by requiring a showing that he was subjected to an "ultimate employment action" in order to have a claim for retaliation. He further contends that the Fifth Circuit's standard on this point is in conflict with that used by other circuits. LSU respectfully submits that petitioner's application for certiorari should be denied because the conflict between the circuits which he relies upon does not rise to the level of importance required for this Court to resolve it since it appears that all of the lower courts are, essentially, reaching the same result, though by different means. LSU points out that this Court has previously declined requests to resolve this "conflict" and submits that there is no reason for it to do so now.

The essence of petitioner's second assignment of error is that the courts below failed to find that he was more qualified than the candidate who was selected. LSU respectfully submits that the standard by which petitioner's qualifications were evaluated is consistent with that called for by this Court. As such, there was no error and certainly no reason for this Court to grant his petition for writ of certiorari.

ARGUMENT

MAY IT PLEASE THE COURT:

***Assignment of Error Number 1*: The Court of Appeals Deprived Petitioner, Manjit S. Kang, Of Rights Afforded By The Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a) By Narrowing the Applications of Sections 703(a)(1) and 704(a) by Relying on Two Judge Made Terms, "Adverse Employment Action" and "Ultimate Employment Decisions"**

Petitioner's retaliation claim in this case was dismissed by the courts below in reliance upon a case decided some three years ago, *Mattern v. Eastman Kodak Co.*, 104 F.3d 702 (5th Cir. 1997), *cert. denied*, 118 S. Ct. 336 (1997). In that case, the Fifth Circuit held that Congress only intended to protect from retaliation those who are subjected to "ultimate employment decisions." The petitioner in this case has not even alleged that he suffered any ultimate employment action.[2] Respondent respectfully submits that the approach taken by the Fifth Circuit, although somewhat different from that adopted by several other circuits does not present an ***important*** conflict, within the meaning of Rule 10 of the Rules of the

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[2] According to petitioner, he was the victim of retaliation in five different ways: (1) various faculty members deliberately attempted to annoy, harass and intimidate him, such as some of the other professors not speaking to him, one following him in the parking lot on one or perhaps several occasions and several coughing and/or making other noises when around him; (2) denial of a request for professional leave and travel reimbursement; (3) receipt of a poor job evaluation; (4) refusal to pay for certain publication costs in connection with a book he had edited (except out of research funds allocated to him); and (5) other similar events ("minor charges and major hassles").

Supreme Court, because this conflict was known at the time when the Fifth Circuit announced its position and this Court denied writs in that very case. See *Mattern v. Eastman Kodak Co.*, 104 F.3d 702 (5th Cir. 1997), *cert. denied*, 118 S. Ct. 336 (1997). Moreover, this Court has declined to take up numerous other cases where actions less than "ultimate employment decisions" were found to be outside of the scope of protection of the Civil Rights Act of 1964.[3]

The conclusion that the difference between the approach adopted by the Fifth Circuit is not an ***important*** conflict with that approach used by several other circuits

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[3] See, e.g., *Hill v. Mississippi State Employment Service*, 918 F.2d 1233 (5th Cir. 1990), *cert. denied*, 502 U.S. 864 (1991) (retaliation claim rejected because based only upon allegations that co-workers stared at plaintiff, followed her, prolonged the time she had to wait for disbursement checks, relegated her file to a less desirable classification, deleted evidence of work experience from a reference form and criticized her for filing an EEO charge); *DeAngelis v. El Paso Mun. Police Officers Assn.*, 51 F.3d 591 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 473 (1995) (jury verdict overturned where employee's complaint of retaliation was based solely on derogatory comments by fellow employees); *Whitaker v. Carney*, 778 F.2d 216, 221 (5th Cir. 1985), *cert. denied*, 479 U.S. 813 (1986) (Title VII held not to protect an employee from harassment outside the workplace by non-employees); *Landgraf v. USI Film Products*, 968 F.2d 427, 431 (5th Cir. 1992), *affirmed*, 511 U.S. 244 (1994) (refusal of co-employees to speak to plaintiff held not to constitute retaliation). See also *Robinson v. City of Pittsburgh*, 120 F.3d 1286 (3rd Cir. 1997) ("anger, irritation, dirty looks, even the silent treatment, can cause distress" but do not rise to the level of an adverse employment action) and *Smart v. Ball State University*, 89 F.3d 437, 441 (7th Cir. 1996) (receipt of a negative performance review does not constitute retaliation).

becomes especially clear when one understands that petitioner herein has overstated the difference in these approaches. Petitioner would have this Court believe that some circuits have concluded that *all* acts of retaliation are prohibited whereas others have limited the scope of protection to those acts of retaliation which constitute "ultimate employment actions." In reality, however, the courts have long concluded that Congress prohibited ***only*** "adverse employment actions." It is just that some courts have opted for a case-by-case approach for deciding what constitutes an adverse employment action, whereas the Fifth Circuit has made an effort to define that term by holding that it means "ultimate employment actions," such as discharge,[4] constructive discharge,[5] withdrawal of a reinstatement offer,[6] refusal to rehire,[7] wrongful denial of promotion,[8] denial of severance benefits[9] or a decrease in compensation.

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[4] See also *Brady v. Thurston Motor Lines*, 726 F.2d 136, 141 (4th Cir.), *cert. denied*, 469 U.S. 827 (1984).

[5] See also *West v. Marion Merrell Dow, Inc.*, 54 F.3d 493, 497 (8th Cir. 1995) and *Holsey v. Armour & Co.* 743 F.2d 199, 209 (4th Cir. 1984), *cert. denied*, 470 U.S. 1028 (1985).

[6] See also *EEOC v. Ohio Edison Co.*, 7 F.3d 541, 546 (6th Cir. 1993).

[7] See also *East v. Romine, Inc.*, 518 F.2d 332, 340 (5th Cir. 1975), *reversed on other grounds, Burdine v. Texas Dept. of Community Affairs*, 647 F.2d 513 (5th Cir. 1981) and *Waddell v. Small Tube Products, Inc.*, 799 F.2d 69, 73-4 (3rd Cir. 1986).

[8] See also *Brady v. Thurston Motor Lines*, 726 F.2d 136, 141-2 (4th Cir.), *cert. denied*, 469 U.S. 827 (1984) and *Bickel v. Burkhart*, 632 F.2d 1251, 1255-6 (5th Cir. 1980).

[9] See also *EEOC v. Cosmair, Inc.*, 821 F.2d 1085, 1089-90 (5th Cir. 1987) (construing parallel provision under the ADEA).

Since ***all*** circuits agree that ultimate employment actions are prohibited, there is no conflict insofar as that aspect of this rule is concerned. Rather, the disagreement lies in terms of conduct, such as that alleged in this case, involving (if true, which is denied) petty, unprofessional behavior toward a colleague.[10] Under the approach adopted by the Fifth Circuit, the answer is clear; the conduct is not actionable. Under the approach used by some other circuits, the answer is not so clear and, presumably, differs from judge-to-judge and case-to-case.[11]

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[10] See footnote 2, above. As noted, all of the individuals accused of having "retaliated" against petitioner vehemently deny having done so. In fact, the ***only*** evidence on these issues submitted to the court in connection with respondent's motion for summary judgment was that adduced by respondent, which established that none of this had occurred and that petitioner was a very sensitive individual who had misinterpreted these (and other) events.

[11] In his application, petitioner has suggested that the Fourth Circuit has followed the Fifth Circuit and, further, that the Seventh, Ninth and D.C. circuits have rejected the Fifth Circuit's analysis. Although this Court is probably not greatly influenced by how many courts are on each side, it should be noted that petitioner's analysis is not exactly accurate. LSU respectfully submits that the "line-up" at present is as follows: only the Eleventh and District of Columbia Circuits have clearly rejected the Fifth Circuit's standard. (And, since at least one D.C. Circuit judge has criticized that court's approach, it may only be a matter of time before the D.C. Circuit revisits its position. See *Tschappat v. Reich*, 957 F. Supp. 297, 299 (D. D.C. 1997).) The Second, Ninth and Tenth circuits have criticized cases which cited or relied upon *Mattern*. See *Richardson v. New York State Dept. of Correctional Services*, 180 F.3d 426 (2nd Cir. 1999); *Ray v. Henderson*, 217 F.3d 1234 (9th Cir. 2000); *Gunnell v. Utah Valley State College*, 152 F.3d 1253 (10th Cir. 1998) and *Jeffries v. State of Kansas*, 147 F.3d 1220 (10th Cir. 1998). Thus,

In any event, on the chance that this issue has, for some reason, now become ripe for consideration by this

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they should, perhaps, be considered aligned with the Eleventh and D.C. circuits. By contrast, the Third, Fourth, Seventh and Eighth circuits appear to use tests which are similar, if not identical, to that adopted by the Fifth Circuit. The remaining circuits have not specifically addressed this issue.

Although the "ultimate employment action" approach used by the Fifth Circuit is based upon a Fourth Circuit case, see *Page v. Bolger*, 645 F.2d 227, 233 (4th Cir. 1981) (en banc), *cert. denied*, 454 U.S. 892 (1981), the Fourth Circuit has not actually had an opportunity to squarely address this issue since the Fifth Circuit wrote *Mattern*. (That is, contrary to petitioner's assertion, the Fourth Circuit did not hold, in *Munday v. Waste Management of North America*, 126 F.3d 239 (4th Cir. 1997) that only ultimate employment actions are protected under the anti-retaliation provision. That case involved a settlement agreement which prohibited *any* retaliation.)

Similarly, petitioner's contention that the Seventh Circuit has rejected the approach adopted by the Fifth Circuit is inaccurate. In fact, its recent cases are consistent with the Fifth Circuit's standard. See *Smart v. Ball State University*, 89 F.3d 437, 441 (7th Cir. 1996); *Rabinovitz v. Pena*, 89 F.3d 482, 488 (7th Cir. 1996); *Williams v. Bristol-Myers Squibb Co.*, 85 F.3d 270, 274 (7th Cir. 1996); *McDonnell v. Cisneros*, 84 F.3d 256, 258 (7th Cir. 1996) (noting tension in Seventh Circuit cases); *Flaherty v. Gas Research Inst.*, 31 F.3d 451, 456-7 (7th Cir. 1994) and *Crady v. Liberty National Bank & Trust Co.*, 993 F.2d 132, 136 (7th Cir. 1993) (construing parallel provision of ADEA).

And, although not mentioned by petitioner, the Eleventh Circuit has disagreed with the Fifth Circuit on this point. See *Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453 (11th Cir. 1998). Similarly, although not mentioned by petitioner, the Eighth Circuit appears to have joined the Fifth Circuit in concluding that only "ultimate employment actions" are covered by the anti-retaliation provision. See *Ledergerber v. Stangler*, 122 F.3d 1142, 1144 (8th Cir. 1997) (holding that "[w]hile the action

Court, it is appropriate to analyze the differences between these two approaches with a view to deciding whether one is so much better than the other that it ought to be imposed upon all circuits.

The approach advocated by petitioner herein clearly has some advantages. It is unquestionably appealing to consider the facts of each and every case to make sure that the right to be free of retaliation assured by the Civil Rights Act of 1964 is being fully protected. By contrast, the "bright line" approach adopted by the Fifth Circuit clearly leaves open the possibility, however slight, that someone whom Congress meant to protect will be left unprotected. This Court unquestionably has the power to decide which approach better serves the needs of those at risk of retaliation, including whether there are sufficient resources in the federal judiciary to engage in a case-by-case analysis of every claim of retaliation or whether a "bright line" approach which offers everyone – courts, employers and employees alike – guidance will work better. The real issue, then, is whether this is a "problem" worthy of this Court's time.

It is well-known that employers almost always want to know, in advance, precisely which actions are allowed and which are not. As the Eleventh Circuit pointed out:

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complained of may have had a tangential effect on her employment, it did not rise to the level of an ultimate employment decision intended to be actionable under Title VII") and *Montandon v. Farmland Industries, Inc.* 116 F.3d 355, 359 (8th Cir. 1997) (holding that a transfer and negative performance evaluation did not constitute retaliation).

> Although we have interpreted Title VII to mean that an employer cannot retaliate by taking an 'adverse employment action' against an employee . . . we have never defined what this general phrase means. [As a result,] a reasonable employer has no way of knowing for certain whether acts short of firing, demoting, or refusing to hire an employee could violate Title VII['s anti-retaliation provision].

Wu v. Thomas, 996 F.2d 271, 274 (11th Cir. 1993), *cert. denied*, 511 U.S. 1033 (1994). Similarly, employees will also benefit by knowing, in advance, what costs they can be expected to have to bear if they file a claim of discrimination or otherwise engage in protected activity. Indeed, it is possible that the "bright line" approach adopted by the Fifth Circuit benefits *employees* more than it does *employers* because it destroys any misconception that an employee might otherwise have about what can happen to him if he files a charge of discrimination. It is plainly unfair to employees to have only a nebulous standard which does not alert them in advance of the risks they are about to take. And, finally, the courts will clearly benefit from a bright line standard which eliminates the need for a time-consuming, painstakingly-slow, case-by-case analysis of the facts in each case of this type.

Even though the possibility exists, under the approach adopted by the Fifth Circuit, that someone, somewhere could be wrongly deprived of his right to be free of retaliation, LSU respectfully submits that the petitioner in this case is not at such a risk. Even if his claim is considered under the case-by-case approach which he prefers, it would still, in all likelihood, be rejected since

all courts have agreed that minor insults do not constitute retaliation.

Moreover, this petitioner cannot prove all of the elements of his case, even if this standard is changed. That is, as this Court is well aware, to establish a claim of retaliation, a plaintiff must show that he was: (1) engaged in protected activity; (2) that he was subjected to an adverse employment action; and (3) that there is a causal connection between the two. Thus, even if this Court remands this matter for further proceedings, petitioner must show that there is a causal link between his filing of an EEOC charge and the "adverse employment actions" which he suffered. Since petitioner submitted ***no*** such evidence in response to respondent's motion for summary judgment (and he was also unable to carry that aspect of his burden of proof in connection with his underlying discrimination claim), it is unlikely, to say the least, that he can produce any such evidence now, even if he is given a second chance to do so.

Petitioner has made no claim that the approach taken by the Fifth Circuit is inconsistent with any decision of this Court. LSU agrees and respectfully submits that the Fifth Circuit's approach is actually consistent with the results reached in three recent cases involving somewhat similar circumstances. As such, if this Court were to take up this issue, it would, in all likelihood, simply accredit the approach now used by the Fifth Circuit which is, as demonstrated above, fast becoming the rule anyway. Thus, again, the question is really whether a grant of certiorari in this case is the best use of this Court's time and resources.

In *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 118 S. Ct. 2257, 141 L.Ed.2d 633 (1998), this Court added definition to the phrase "tangible employment actions" in the context of sexual harassment claims, by holding that where a tangible job detriment occurs, the employer will be liable for supervisory sexual harassment. The definition of "tangible employment action" in this context is "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits. 118 S. Ct. at page 2268. That is, of course, the same approach taken by the Fifth Circuit for retaliation claims and reflects the same preference for clarity and predictability.

Similarly, the Fifth Circuit's decision is in line with this Court's decision in *Robinson v. Shell Oil Company*, 519 U.S. 337, 117 S. Ct. 843, 136 L.Ed.2d 808 (1997). In that case, this Court resolved a split among the circuits and extended Title VII's anti-retaliation provision to cover former employees. The case involved an employee who, shortly after being fired by Shell, filed an EEOC charge. While that claim was pending, the employee applied for a job with another company, which contacted Shell for an employment reference. As a result of the reference given, the other company declined to hire the plaintiff. At first glance, this would appear to be inconsistent with *Mattern v. Eastman Kodak*, in that supplying a negative reference does not appear to be an "ultimate employment action." However, blacklisting a former employee is considered an ultimate employment action when it results in a decision not to hire that person (as opposed to a negative job

evaluation which has no immediate effect upon employment conditions). See *Page v. Bolger*, 645 F.2d 227 (4th Cir. 1981) (en banc), *cert. denied*, 454 U.S. 892 (1981).

Finally, there is nothing in the Fifth Circuit's decision which conflicts with this Court's interpretation of the extent of protection enjoyed by government employees who do not support the political party in power. In *Elrod v. Burns*, 427 U.S. 347, 96 S. Ct. 2673, 49 L.Ed.2d 547 (1976) and *Branti v. Finkel*, 445 U.S. 507, 100 S. Ct. 1287, 63 L.Ed.2d 574 (1980), this Court ruled that government officials could not lawfully discharge or threaten to discharge public employees solely for not supporting the political party in power (unless party affiliation was an appropriate prerequisite for the position involved). Then, in *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 110 S. Ct. 2729, 111 L.Ed.2d 52 (1990), this Court extended that protection to cover promotions, transfers, recalls, and hiring decisions. Although *Rutan* was, of course, based on the First Amendment, and not Title VII, the similarity in results is striking.

If this Court decides that this is a good time to take up this issue, after declining to do so in the past, LSU respectfully submits that the approach used by the Fifth Circuit should be adopted by this Court.

***Assignment of Error Number 2*: The Court of Appeals Erred By Granting Defendant's Summary Judgment In This Title VII Discrimination Case**

Petitioner next contends that the courts below erred by granting respondent's motion for summary judgment. He complains that the courts improperly "weighed the

evidence" and, ironically, at the same time grouses that they failed to give appropriate consideration to his qualifications relative to those of the candidate originally selected. He further contends that the courts wrongly concluded that LSU satisfied its burden of articulating a legitimate, nondiscriminatory reason (for the failure to promote petitioner to the position of department chairman) and that he failed to make a sufficient showing of pretext. Lastly, he argues that this Court has never sanctioned the standard used by the Fifth Circuit to evaluate disparities in qualifications of job applicants.

The gist of petitioner's complaint in this assignment of error is that the courts below failed to find him more qualified, or at least as qualified, as the candidate who was originally selected for the open position. While his disappointment in the factual findings made herein is certainly understandable, it does not make this case certworthy. See Rule 10 of the Rules of the Supreme Court of the United States. Moreover, the lack of merit of petitioner's assertions should be obvious from reading the decisions of the magistrate judge, district court and court of appeal. Petitioner submitted no evidence whatsoever – direct or indirect – to prove that his national origin was *the* – or even *a* – factor in the selection decision. The dismissal of petitioner's claims by summary judgment for failure to prove an essential element of his case was entirely appropriate in this matter.

Nor was the wrong standard applied for comparing petitioner's qualifications to those of the candidate who was selected for this position. Petitioner's argument overlooks the fact that it is not the role of the courts to second guess employers' hiring decisions, especially as to which

candidate was best qualified or best suited for a particular job. In fact, this Court has admonished the courts to abstain from becoming "personnel managers" and warned them of the dangers of deciding which business practices are best. See *Furnco Construction Corporation v. Waters*, 438 U.S. 567, 98 S. Ct. 2943, 57 L.Ed.2d 957 (1978). In line therewith, the Fifth Circuit has held that mere disparities in qualifications are not enough, in and of themselves, to demonstrate discriminatory intent unless those disparities "are so apparent as virtually to jump off the page and slap you in the face." See *Deines v. Texas Dep't Of Protective and Regulatory Services*, 164 F.3d 277 (5th Cir. 1999); *Scott v. University of Mississippi*, 148 F.3d 493, 508 (5th Cir. 1998) abrogated on other grounds by *Kimel v. Florida Bd. Of Regents*, 528 U.S. 62, 120 S. Ct. 631, 145 L.Ed.2d 522 (2000); *EEOC v. Louisiana Office of Community Services*, 47 F.3d 1438, 1445 (5th Cir. 1995) and *Odom v. Frank*, 3 F.3d 839, 847 (5th Cir. 1993).

This rule is based not only on the inherent difficulty of evaluating qualifications, but also upon the notion that, in Title VII cases, "we do not try in court the validity of [an employer's] good faith belief as to [one] employee's competence [in comparison to another]." *Mayberry v. Vought Aircraft Co.*, 55 F.3d 1086, 1091 (5th Cir. 1995). Thus, whether "the employer's decision was the correct one, or the fair one, or the best one is not a question within the jury's province to decide. The single issue for the trier of fact is whether the employer's selection of a particular applicant over the plaintiff was motivated by discrimination." *Deines, supra*, 164 F.3d at 280.

Although petitioner has not suggested that there is a conflict in the circuits on this point, it should be noted

that the courts of this country appear to be in complete agreement that it is not their place to sit as a "super-personnel department."[12] LSU respectfully submits that the approach taken is not only a correct interpretation of the Civil Rights Act of 1964, but, from a practical standpoint, the only one which could have been taken. As such, there is no reason for this Court to reconsider that standard or to review its application in this case.

Petitioner herein has also failed to identify what "other" standard would be more appropriate to use and he has failed to explain how that "other" standard would have made a difference to the outcome of his case. As previously noted, petitioner failed to submit any evidence, whether direct or circumstantial, which shows or even tends to suggest that he was not selected for the position of department chairman because of his national origin.

All five of the judges below who examined petitioner's claims agreed that he lacks the evidence necessary to proceed to trial. There is simply no reason for this Court to conclude otherwise.

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[12] See, e.g., *Parcinski v. Outlet Co.*, 673 F.2d 34, 37 (2nd Cir. 1982), *cert. denied*, 459 U.S. 1103 (1983) (ADEA case); *Smart v. Ball State University*, 89 F.3d 437, 441 (7th Cir. 1996); *Williams v. Bristol-Myers Squibb Co.*, 85 F.3d 270, 274 (7th Cir. 1996); *Mechnig v. Sears, Roebuck & Co.*, 864 F.2d 1359, 1365 (7th Cir. 1988); *Dale v. Chicago Tribune Co.*, 797 F.2d 458, 464 (7th Cir. 1986); *Pollard v. Rea Magnet Wire Co.*, 824 F.2d 557, 560 (7th Cir. 1987), *cert. denied*, 484 U.S. 977 (1987); *Kephart v. Institute of Gas Tech.*, 630 F.2d 1217, 1223 (7th Cir. 1980), *cert. denied*, 450 U.S. 959 (1981); *Hutson v. McDonnell Douglas Corp.*, 63 F.3d 771, 781 (8th Cir. 1995); *Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466, 1470 (11th Cir. 1991).

CONCLUSION

For the foregoing reasons, LSU respectfully requests that this Honorable Court deny Manjit S. Kang's petition for writ of certiorari.

Respectfully submitted,

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